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In the Supreme Court of the United States

October Term 1954

JOHN MAHONEY,
Petitioner,

vs.

SAILORS' UNION OF THE PACIFIC, a voluntary association, ROBERT DOMBROFF, R. JOHANSEN, and HARRY LUNDEBERG,
Respondents.

No. 643

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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In the Supreme Court of the United States

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Respondents.

No.....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

To the Honorable, The Supreme Court of the United States:

John Mahoney, petitioner herein, does hereby pray that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Washington, which said judgment modified the judgment of the Superior Court of the State of Washington, thus denying a portion of the relief prayed for by said petitioner in the original action.

REFERENCE TO THE OPINIONS OF THE STATE COURTS

Judgment of the Superior Court of the State of Washington in favor of petitioner herein was entered on January 4, 1952. This being a court of first impression, the judgment was not reported. The judgment is appended hereto, found Appendix 17.

Upon appeal to the Supreme Court of the State of Washington the first opinion of that court was reported in 43 Wash. (2d) 874. Appended hereto, Appendix 19. Filed December 17, 1953.

Opinion upon rehearing, modifying original opinion, reported 145 Wash. Dec. 422; appended hereto, Appendix 48. Filed October 25, 1954.

JURISDICTION

1. The judgment and Decree of the Supreme Court of the State of Washington, sought to be reviewed herein, was dated December 16, 1954 (R. 121), and was entered on the same date, to-wit: December 16, 1954. (Appendix 61.) This petition is presented prior to March 16, 1955.

2. After the filing of the original opinion in the Supreme Court of the State of Washington, on the 17th of December, 1953, petitions for rehearing were filed. On April 1, 1954, order granting rehearing and

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stating that a date for hearing *en banc* would be fixed later, was signed and filed. (R. 104)

3. Jurisdiction of this court is sustained by Judicial Code, Sec. 237 (b), as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 937, being formerly 28 U.S.C.A. sec. 344 (b), now 28 U.S.C.A. 1257, and 28 U.S.C.A. 2106.

QUESTIONS FOR REVIEW

The sole question for review is as follows: Does the passage and scope of The Labor Management Relations Act of 1947, 61 Stat. 136, *et seq.*, 29 U.S.C.A., 1952 edition, sec. 141, *et seq.* (commonly known as The Taft-Hartley Act), deprive State courts of jurisdiction to (a) reinstate by injunctive action a member of a labor union whose members engage in commerce, who has been improperly expelled, and (b) award him damages calculated upon his loss of wages, by reason of his expulsion. The final judgment of the Supreme Court of the State of Washington concluded that the State court, on equitable grounds, could reinstate the petitioner, but modified the judgment of the Superior Court, by concluding that the Federal Act herein referred to (The Taft-Hartley Act) deprived the court of jurisdiction to make petitioner whole by granting him damages as aforesaid.

The court concluded that the Taft-Hartley Act gave

the National Labor Relations Board exclusive jurisdiction over the latter phase of the question above set forth and therefore precluded the courts of the State of Washington from hearing and determining that issue.

STATUTES AND CONSTITUTIONAL PROVISIONS WHICH THIS CASE INVOLVES

1. The Labor Management Relations Act of 1947, 61 Stat. 146, *et seq.*, 29 U.S.C.A., 1952 edition, sec. 141, *et seq.;* specifically, 29 U.S.C.A., 1952 edition, sec. 160, the pertinent portion hereof being as follows:

> "Prevention of unfair labor practices—Powers of Board generally
>
> (a) The Board is empowered, as hereinafter provided, to prevent any person in engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation, except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this sub-

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chapter or has received a construction inconsistent therewith.

* * * * * *

Reduction of testimony to writing; findings and orders of Board

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named

in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * *

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceed-

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ings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were r e a s o n a b l e grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive

and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

STATEMENT OF THE CASE

This action was brought by petitioner herein to secure reinstatement in the Sailors' Union of the Pacific, a Labor Union supplying personnel to work on offshore vessels, and to be compensated for damages, measured by his loss of earnings, during the period of his expulsion. It was alleged that he had been unlawfully expelled, and after a lengthy trial in the Superior Court of the State of Washington, the trial court made Findings of Fact and Conclusions of Law sustaining the position of the petitioner, ordering his reinstatement, and assessing damages based upon the testimony as to the difference in his earnings caused by his deprivation of work as a seaman in the amount of $3,533.63. (R. 23-35.) A judgment was entered on these Findings of Fact (R. 36-37).

An appeal was taken by the defendant union to the Supreme Court of the State of Washington. By an *en banc* opinion, filed on December 17, 1953, the Supreme Court in a 7 to 2 decision affirmed the judgment of the trial court. (R. 40-72; Appendix 19.) There-

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after a petition for rehearing was filed by the appellant union (R. 73-77), and subsequently an order was issued granting this petition (R. 104). Thereafter by opinion dated October 25, 1954 (Appendix 48), the Supreme Court modified its original opinion, and the judgment of the Superior Court, in the following respects:

The court concluded that the Taft-Hartley Act, 29 U.S.C. 1952 edition, sec. 160 (c), (e), did not preclude the State court from reinstating petitioner in the union, but did preclude the State court, on a jurisdictional basis, from awarding him damages, based upon his loss of earnings. This conclusion was reached upon the theory that the above-cited Federal statute gave exclusive jurisdiction to the National Labor Relations Board to hear and to deal with unfair labor practices, and to remedy any damages that might flow from such an unfair labor practice. But conversely, the Supreme Court of the State of Washington held that the Federal Act above cited did not prevent State courts from protecting property rights of an individual and that petitioner herein had valuable property rights in the union of which he had been illegally deprived and that therefore the State courts had jurisdiction to order his reinstatement, upon his payment of accrued back dues and assessments since the date of his illegal expulsion. The net effect of the ruling

of the Supreme Court of the State of Washington is to grant petitioner herein a Pyrrhic victory, ordering that he be reinstated in the union from which he has now been absent some five years by reason of the expulsion, but declining to make him whole for his damage suffered. The question of the propriety of the expulsion of petitioner is not before this court, that having been determined in the State courts.

This case was tried upon the original pleadings, the complaint setting forth the position of the petitioner herein as heretofore described. The answer denied many of the allegations of the complaint and raised certain affirmative defenses, none of which involved the question now before this tribunal. The original decision of the Supreme Court of the State of Washington consisted of many pages, including a majority opinion and a lengthy dissent by two members of the court. Although appellant had in its brief raised the question of the exclusive jurisdiction of the National Labor Relations Board, and thus contended that the State courts were without jurisdiction to determine the issues, nevertheless the original opinion of December 17, 1953 (Appendix 19), did not comment upon this contention. Shortly after the entry of that opinion, counsel for the union became aware of the decision of the United States Supreme Court in *Garner v. Teamsters, Chauffeurs & Helpers Local No. 776*, 346 U.S.

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485, 74 Supreme Ct. 161, 98 L. Ed. 161. This case became available in this area in the Advance Reports of the Supreme Court of the United States, Lawyers Edition, of January 4, 1954. As a result a petition for rehearing was filed by the appellant union (R. 73-77). This petition for rehearing was based upon the *Garner* case, *supra*, and a reiteration of the contention contained in appellants' brief that the State courts were deprived of jurisdiction as aforesaid. The Supreme Court of the State of Washington finally granted that petition for rehearing and, after briefs were filed, oral argument *en banc* was had, culminating in the second opinion of the court filed on October 25, 1954 (Appendix 48). It will therefore be seen that the raising of this Federal question, with its contention that the Federal Act, *supra*, had deprived the State courts of jurisdiction, came before the court in an unusual fashion. As aforesaid in this petition, the Supreme Court of the State of Washington, upon the petition for rehearing and the argument thereon, concluded that they were partially deprived of jurisdiction. Certificate of Chief Justice (R. 122).

ARGUMENT IN SUPPORT OF REQUEST FOR ISSUANCE OF THE WRIT OF CERTIORARI

It is the contention of the petitioner herein that a writ of certiorari should issue to the end that the Su-

preme Court of the United States may have the opportunity of clarifying a situation now existent relative to the scope of preemption, if any, that the enactment of the Labor Management Act of 1947, as amended (colloquially known as the Taft-Hartley Act), encompasses.

For many years the State courts have taken the position that they had jurisdiction to entertain applications to reinstate individual members of a labor union, even though that union and the work involved was engaging in commerce between the States, and additionally to recompense by way of damages a member of the union improperly expelled or suspended, measuring his damages by the difference between his earnings since the expulsion and his average earnings prior thereto. Numerous cases may be cited to sustain the foregoing statement. Suffice it to say, in our State of Washington our Supreme Court has so held on several occasions, to-wit: *Jones v. Leslie*, 61 Wash. 107, 112 Pac. 81; *Washington Local Lodge, etc. v. International Brotherhood of Boilermakers*, 33 Wash. (2d) 1, 203 Pac. (2d) 1019; *Leo v. Local Union No. 612 of International Union of Operating Engineers*, 26 Wash. (2d) 498, 174 Pac. (2d) 523.

However, by the opinion in the Mahoney case herein, the Supreme Court of the State of Washington has

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now departed from that announced rule and admittedly has taken that departure solely upon the theory that exclusive jurisdiction to grant damages to an illegally expelled union member is a function no longer permitted by State courts, by reason of the enactment of the Labor Management Act of 1947 as amended, and specifically basing that position upon those sections of that Act found in 29 U.S.C. sec. 160. It will thus be seen that the State court of the State of Washington has decided a Federal question of substance. Speaking parenthetically, we say it is of substance because any deprivation of prior jurisdiction of a State court by reason of the passage of a Federal act becomes a matter of grave moment to the citizens of each State. Additionally, the countless millions of individuals enrolled as members in labor unions now find themselves, under the authority of the Mahoney case as it now stands, deprived of a ready tribunal near at hand upon which they have come to rely. This question, poised by the request herein for the issuance of a writ of certiorari, is one of substance not heretofore determined by the Supreme Court of the United States. It is true that the petition for a writ of certiorari was denied in *Born v. Laube*, 213 F. (2d) 407, C. A. Ninth, decided May 26, 1954. Nevertheless, a reading of that case would indicate that the precise question was not presented to this court, and additionally any denial of

such a writ does not in itself constitute a clearly enunciated determination of a situation vital to many citizens of the United States of America.

Additionally, it is respectfully suggested that a reading of *Garner v. Teamsters, Chauffeurs & Helpers Local No. 776, A. F. of L.*, 346 U.S. 485, 74 Supreme Ct. 161, 98 L. Ed. 161, will disclose that even in that case the Supreme Court of the United States apparently did not intend to enunciate the principle that the field of relationships between a union and its component members had been preempted by the Labor Management Act. Indeed, a pertinent citation therefrom would so indicate. The court there observed that the Act

> "leaves much to the States, though Congress has refrained from telling us how much."

The court then said, referring to the subject matter of that case,

> "This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent, which therefore either is 'governable by the State or is entirely ungoverned.' In such cases we have declined to find an implied exclusion of State powers. *In'ernational Union U.A.W., A. F. of L., Local 232, vs. Wisconsin Employment Relations Board*, 336 U.S. 245, 254, 69 S. Ct., 516, 521, 93 L. Ed. 651." Page 164.

We submit that in this instant case a scrutiny of the

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Labor Management Act of 1947, as amended, will not produce authority, express or even implied, that would permit the Board to adequately redress petitioner herein, had he applied to the Board in the first instance when he was improperly expelled. We contend that the Act is devoid of any such authority from which judicially it can be determined that the field has been preempted. Indeed, an examination of the complete Act leads one to the belief that the Congress of the United States scrupulously intended to avoid attempting to interfere with the internal management of unions, and if that be so, the power inherent in the courts of the several States still remains, to redress one of its citizens for a deprivation of valuable rights, and in so doing to make him whole by way of damages. Although the precise question was not presented, it is respectfully suggested that the case of *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 74 S. Ct. 833, 98 L. Ed. 686, recognizes this principle. In that case the State court was held to have jurisdiction, because the Labor Management Act of 1947 did not provide a procedure under which the plaintiff in that case could have obtained the compensatory relief which he sought, by way of damages for loss of profits due to interference with the performance of his contracts by the act of the defendant union.

An additional indication that the Congress did not

intend to deprive the States of jurisdiction may well be inferred from the language of sec. 164 of the Labor Management Act of 1947 as amended, found in 29 U.S.C.A. sec. 164 (b). This subsection reads as follows:

> "(b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, sec. 101, 61 Stat. 151."

This language has been construed that the Congress did not intend to interfere with the right of States to prohibit agreements requiring membership in a labor organization as a condition of employment. *Finney v. Hawkins*, (Va.) 1949, 54 S.E. (2d) 872.

From the foregoing brief statement, we respectfully contend that the question at issue is one of grave importance, not previously determined by the Supreme Court of the United States, and that therefore the writ of certiorari prayed for herein should issue.

Respectfully submitted.
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Attorneys for Plaintiff.

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Appendix

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

JOHN MAHONEY,
Plaintiff,

vs.

SAILORS' UNION OF THE PACIFIC, a voluntary association, ROBERT DOMBROFF, R. JOHANSEN, and HARRY LUNDEBERG,
Defendants.

No. 412322
JUDGMENT

This matter having come on before the Honorable Donald A. McDonald, one of the Judges of the above entitled Court, and said matter having continued in trial, and the Court having listened to sworn testimony of the witnesses and having examined the files and records herein, and having listened to the arguments of counsel and having rendered its written memorandum decision, and the Court having heretofore made and entered Findings of Fact and Conclusions of Law, and the Court having heard defendants' motion for judgment notwithstanding the decision of the Court or in the alternative for new trial and having entered an order denying the same, and the Court being fully advised in the premises, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the purported expulsion of plaintiff, John Mahoney, is hereby declared to be void and a nullity, and it is further

ORDERED, ADJUDGED AND DECREED that defendant Sailors Union of the Pacific, by and through

its duly elected officials, is hereby ordered to forthwith reinstate said John Mahoney and to accord to him all the rights and privileges of membership in said Sailors Union of the Pacific on the condition that said John Mahoney shall pay all dues and assessments now due and payable, and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff have and recover judgment against the defendant Sailors Union of the Pacific in the sum of $3,533.63, together with interest thereon from date hereof, and plaintiff is further awarded judgment from said defendant at the rate of $453.90 per month, less any earnings he may have, from October 30, 1951, until such time as the judgment herein shall become final and absolute and that the Court at such time shall make such a determination as to said amount of additional judgment, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Sailors' Union of the Pacific be and it is hereby permanently enjoined from attempting to again expel plaintiff for any of the matters or things alleged in plaintiff's complaint and proven at the trial of this cause, or for plaintiff's attempt since the date of his alleged expulsion to gain reinstatement, and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff be and he is hereby awarded his costs and disbursements to be taxed herein.

DONE IN OPEN COURT this 4th day of January, 1952.

DONALD A. McDONALD,
Judge.

Presented by:

JOHN M. SCHERMER,
of Monheimer, Schermer & Mifflin,
Attorneys for Plaintiff.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN MAHONEY,
Respondent,

vs.

SAILORS' UNION OF THE PACIFIC, a voluntary association, ROBERT DOMBROFF, R. JOHANSEN, and HARRY LUNDEBERG,
Appellants.

No. 32101
EN BANC

Filed
Dec. 17, 1953

This action was brought by John Mahoney against Sailors' Union of the Pacific, a voluntary association, to secure a judgment setting aside an order expelling him from the union, commanding his reinstatement, and awarding damages. The court granted the relief prayed for by Mahoney and awarded judgment in the sum of $3,533.63, and a further award of $453.90 per month, less earnings from October 30, 1951, until such time as the judgment would become final. And it provided that at such time the court would make a determination of the amount of additional judgment. Injunctive relief against expulsion was awarded. The union appealed.

Respondent was a member of appellant union and a sailor by occupation. It is in this manner that he earns a livelihood. When respondent became a member of the union he took the following obligation.

> "I pledge my honor as a man, that I will be faithful to this Union, and that I will work for its interest and will look upon every member as my brother; that I will not work for less than Union wages and that I will obey all orders of the Union. I promise that I will never reveal the proceedings of the Union to its injury or to persons

not entitled to know it. And if I break this promise, I ask every member to treat me as unworthy of friendship and acquaintance. SO HELP ME GOD!"

The constitution of the union contained the following provisions:

"'ARTICLE III. Membership. SECTION 4. . . . Any member who advocates and/or gives aid to the principles and policies of any hostile or dual organization, or gives aid or comfort to such, shall be denied further membership in this Union . . .

"'ARTICLE V. Duties of Members. SECTION 1. It shall be the duty of each member to be true and loyal to the Union and the labor cause, and to endeavor to put into practice the principles laid down in the Preamble. Members shall treat the officers of the Union while discharging their duties with due respect and consideration, and yield strict obedience to such rules as the Union may see fit to adopt.'"

Article 19, Section 1, of the constitution and by-laws of the union provides:

"'Any charge of violating the laws and rules of the union made against any member must be submitted in writing to regular meeting. Thereupon a trial committee of five full members shall be elected to which said charges shall be referred without discussion. Such committee shall be elected in a Port most convenient to both accused, and accuser, and witnesses.'"

On May 23, and June 6, 1949, respondent attended union meetings in Seattle at which he made remarks resulting in the following charges being preferred against him:

"'We, the undersigned book members and offi-

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cials of the Sailors' Union of the Pacific, hereby prefer charges against John Mahoney, Book No. 4344, for the following reason:

" 'Mahoney's scurrilous and defamatory remarks entered in the minutes of the Seattle meeting May 23, 1949, when John Mahoney "wanted to know who gave the pie-cards the authority to engage in strike breaking activities and how come the membership or the organization were not kept advised of this' and also because of his remarks entered in the minutes of the Seattle meeting June 6, 1949, when Mahoney reiterated the same statement.

" 'The above are definite violations of the Constitution of the Sailors Union of the Pacific which are listed as follows:

" '1. Violation of the Obligation.

" '2. Violation of Article III, Section 4.

" '3. Violation of Article V, Section 1.

" 'We hereby request that John Mahoney, Book No. 4344, appear before a trial committee at Headquarters in accordance with Article XIX, Section 1. . . .' "

On July 12, 1949, a trial was conducted by the union at San Francisco. The respondent did not appear at the trial. An order was entered expelling respondent from the union.

The judgment of the court setting aside the order expelling respondent from the union must be affirmed for three reasons: (1) expulsion from the union deprived respondent of a property right without due process of law; (2) appellant violated the above-quoted provision of its constitution in conducting the trial at San Francisco instead of Seattle, the place where the alleged offense occurred, and also denied respondent procedural due process of law; and (3) the conduct

of respondent was not a violation of the union constitution for which he can be expelled from the union.

Without membership in the appellant union respondent would be unable to secure employment as a sailor upon any vessel leaving ports within its jurisdiction. The union issued shipping cards to its members. When a vessel owner desired sailors, he so advised the union and the jobs were posted at its hiring hall. Members competed for a job by handing in their shipping cards, and the member whose card bore the oldest date was given the job. On August 4, 1949, respondent held the most eligible card for a job on the S. S. Baranof, but because of his expulsion he was refused the job.

The charges preferred against respondent and upon which he was tried were not sufficient from a legal standpoint to warrant expulsion from the union when the effect of such expulsion was to disable him from securing employment as a sailor. The following of a lawful vocation by which one may earn a livelihood is a property right of which one may not be deprived without due process of law. *Jones v. Leslie*, 61 Wash. 107, 112 Pac. 81; *Washington Local Lodge, etc. v. International Brotherhood of Boilermakers*, 33 Wn. (2d) 1, 203 P. (2d) 1019; *Nissen v. International Brotherhood*, etc., 229 Iowa 1028, 295 N.W. 858; *Lo Bianco v. Cushing et al.*, 117 N. J. Eq. 593 177 Atl. 102; *DeMille v. American Federation of Radio Artists*, 31 Cal. (2d) 139, 187 P. (2d) 769. These cases cite others which recognize and apply the same rules of law.

The basic thought expressed by the courts is that if the union chooses to have the advantage of closed or union shop provisions in its contracts with employees, it must in turn preserve and protect membership in the union.

We do not wish to be understood as holding that a union may not reasonably discipline its members for infractions of is laws, rules, and regulations, but such

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discipline must not be of such a character as to deprive a member of a property right. Nor do we exclude the idea that a situation may exist where expulsion would be lawful. Such a question must be met and determined if and when it arises.

The procedural machinery for the trial of union members by one of its authorized tribunals must also meet the requirements of due process of law. The constitution and by-laws of the union provide that such trials shall be held at a port most convenient to accused, accuser, and witnesses, and generally this is the place where the alleged offense was committed. The record shows that the objectionable statements made by respondent were made at meetings of the union in Seattle, and necessarily what was said by him on those occasions would be heard only by the members present. One cannot escape the conclusion that the Port of Seattle would have been most convenient to respondent, the union, and the members present at the meetings. The union's constitutional provision follows the general rules of law on the subject of place of trial, and conducting the trial at San Francisco was not only contrary to the union's constitution and by-laws but denied respondent procedural due process of law.

The subjects of membership in a union being a property right and procedural requirements of trials before union tribuanals, are discussed in 27 Wash. L. Rev. 211, and 4 Stanford L. Rev. 177. The article in the Stanford Law Review gives a history of and discusses the controversy between respondent and appellant. We invite those interested in the subject of property rights of workmen to read and consider what was said by Chief Justice Dunbar in the case of *Jones v. Leslie, supra*, and quoted on page 70 of 33 Wn. (2d).

The conduct of respondent, either as charged or proved, was not a violation of the union constitution for which he can be expelled from the union. Whether it be said that he asked a question or made a statement, he did so in the union meeting. He spoke there

upon union policies, as a member of the union, to the other members present. This he should be able to do freely, without fear of expulsion. The union constitution does not provide to the contrary. The trial court was correct in holding, in effect that speech *per se* is not rebellion. See 4 Stanford L. Rev. 177, p. 212. The charge being insufficient, the proceeding based upon it was a nullity and plaintiff's expulsion was void. *Leo v. Local Union No. 612 of International Union of Operating Engineers*, 26 Wn. (2d) 498, 514, 517, 174 P. (2d) 523 (1946), and case cited.

The court made findings of fact which are supported by the evidence and among them found that respondent by reason of his expulsion from the union had been unable to obtain employment as a sailor upon any of the vessels shipping from Pacific coast ports since April 17, 1950; that his average earnings during the past several years when employed as a sailor have been four hundred twenty-five dollars per month; that between April 17, 1950, and October 30, 1951 (the date of trial), he had suffered a loss of earnings in the sum of four hundred twenty-five dollars per month; and that this would continue until such time as he was reinstated in the union, given a shipping card, and permitted to again be employed on sailing vessels. The court ordered that upon the decree in the case becoming final, upon appeal or otherwise, a determination should then be made as to any additional damages since October 30, 1951, which respondent may suffer by reason of the expulsion.

The court adopted a correct method of arriving at the damages suffered by respondent up to the time of the trial and provided a proper method for determining subsequent damages until the judgment becomes final upon appeal to this court and respondent is reinstated in the union with all of his former rights and privileges.

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The judgment is affirmed.

Grady, C. J.

We concur:
Mallery, J.
Hill, J.
Hamley, J.
Donworth, J.
Weaver, J.
Olson, J.

FINLEY, J. (dissenting)—There is more to this case than meets the casual eye. John Mahoney, plaintiff, is seeking reinstatement as a member of the Sailors' Union of the Pacific, and damages representing employment earnings, which he claims he lost because of his allegedly wrongful expulsion from the union. On one side of the controversy, the union claims that Mahoney's expulsion was justifiable and proper; that he was a disloyal member; that his conduct at certain union meetings (a) violated union principles, policies, and certain union constitutional provisions, (b) was disruptive and seriously adverse to the best interests of his union, and (c) gave support and aid to a rival union, The Canadian Seamen's Union, whose officers purportedly were identified with certain left-wing interests in the Canadian labor movement. On the other side of the controversy, Mahoney claims that his conduct was not improper; that, in effect, it constituted merely an exercise of the right of freedom of speech at a union meeting; that he has been deprived of union membership without proper justification therefor in a manner inconsistent with recognized principles of due process of law. The trial court decided in favor of Mahoney, ordered that he be reinstated, and awarded his damages. The union appealed.

The briefs on appeal show there is some considerable disagreement between appellants and respondent as to the questions which should be considered and resolved in deciding this case. Their disagreement

seems to be based upon conflicting interpretations of the operative facts.

Occasionally, in a debate, lawsuit or dispute of international proportions, the manner in which questions and issues are stated may be of some considerable significance. Regarded superficially, this case may appear to be an extremely simple one, involving merely a question of the right of a member of a labor union to express or state his views democratically as to a matter under discussion at a membership meeting of his union. Or the case may seem to present merely the question of whether membership in a union by some timid soul, average worker, or lower-income citizen, involves a property right which should be protected by the courts because of the significance today of union membership relative to employment and the earning of a living by so many individuals in our society. To me the case is not such a simple one.

I have become convinced that the questions in this case, properly stated and entitled to the most emphasis, are:

(1) Whether a majority of the members of a labor organization have a right to determine the policies of their organization (assuming, of course, that such policies are not prohibited by law);

(2) Whether the majority, through duly elected union officials, may act to implement validly adopted union policies, and may expel a dissenting minority member, who, not only is opposed to such union policies as a matter of principle, discussion or debate, but has actively endeavored to disrupt and obstruct such policies, thereby aiding a rival, purportedly, communist-dominated union.

In view of the foregoing, a detailed and somewhat lengthy summary of the facts here at the beginning may be helpful in arriving at a proper understanding of the case and the issues involved.

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The membership of the Sailors' Union of the Pacific (SUP) consists mainly of sailors who man vessels operating out of Pacific Coast ports and on the Great Lakes. As is the case with many unions, SUP has adopted a written constitution. However, the organizational structure of SUP differs from that found in the usual labor union. The headquarters of SUP are in San Francisco. There are branches in Seattle, Portland, New York, and other large American ports, and also in Hawaii. With the possible exception of the headquarters office in San Francisco, the branches have much less local autonomy than geographical units or "locals" of other labor unions. In other words, in many respects the entire membership of SUP and the entire organization constitutes one single, closely inter-related or cohesive entity. The chief executive of SUP is its secretary-treasuer. The office presently is held by Harry Lundeberg, one of the appellants herein. The SUP also has an assistant secretary. In each port where a branch of SUP is maintained, there is one official designated as "agent," and one or more officials known as a "patrolman." Each agent is the administrative head of the particular branch and is assisted by one or more patrolmen. All of the aforementioned officials are elected by *the entire membership of all of the various branches of SUP, including the headquarters in San Francisco.* The secretary-treasurer and the assistant secretary have their offices in San Francisco.

It is significant that meetings for the discussion and conduct of union business are held regularly in the various port branches every Monday night. Those members present elect from their number a presiding officer and a secretary for the particular meeting. The minutes of each branch meeting are promptly transmitted to the other branches. They are read at the next meeting of the other branches. The minutes cover business transacted, actions taken, and discussions of such matters. *The membership of the various branches regularly vote whether or not to concur as to the*

minutes of previous meetings of the other branches, relative to actions taken by a particular branch. In addition, SUP's constitution gives the headquarters the power to veto action taken individually by the other branches.

A sailor's membership in SUP is practically a prerequisite to employment on vessels as to which SUP holds collective bargaining contracts. It is important to note that jobs available to members of SUP are allocated on the basis of so-called "shipping cards." Any member in good standing may apply for a shipping card. When issued, the cards are valid and the holder is entitled to be considered for employment or job placements, as requested by ship owners with whom the union holds collective bargaining agreements. The cards are current and valid for sixty days after issuance. By attending a branch meeting, a member may validate or keep his shipping card current beyond the initial sixty-day period. The member who holds the oldest current, valid shipping card (considering the date of its original issuance) is entitled to employment preference insofar as the filling or dispatching of jobs by SUP is concerned.

With these details as to the structure of SUP, and with the significance of membership therein in mind, we may now come closer to the circumstances which gave rise to this lawsuit. In May of 1949, and prior thereto, SUP was involved in a jurisdictional controversy with another maritime union known as the Canadian Seaman's Union (CSU). This controversy was an outgrowth of a union policy initiated by SUP and designed to expand its jurisdiction. The SUP expansionist policy appears to have been officially adopted by a majority of SUP's members at a convention held by the entire organization. Certain members, including John Mahoney, disagreed with the policy of expansion. To say the least, one rival union, the CSU, was not in favor of SUP's expansionist policy. The CSU had had a collective bargaining agreement with the

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owners of a vessel known as the "Argojohn." In May, 1949, SUP, through the Seafarers' International Union of North America (SIUNA), an affiliate sponsored by SUP, negotiated a collective bargaining agreement with the particular shipowners, to cover the employment of sailors with respect to the "Argojohn." The "Argojohn" went into dry dock on May 17, 1949, at the Todd Shipyards in Seattle, for extensive repairs. At that time, the ship was manned by members of SIUNA, although, as just pointed out, it had previously been manned by CSU members. At the time in question, the leaders of CSU had called a strike against Canadian shipowners, including the owners of the "Argojohn."

When the "Argojohn" went into dry dock (May 17, 1949), a vessel known as the "American Mail" was moored at the Todd Shipyards in Seattle. SUP held a collective bargaining contract with the owners of the "American Mail." The contract contained a no-strike clause, which read as follows:

> "Section 6: Strikes and lockouts. There shall be no strike or shuttages of work during the period of this agreement for any cause."

In connection with the strike called by the leaders of CSU against the Canadian shipowners, picket lines were set up at the Todd Shipyards by CSU. It is a well known fact that in labor circles and among active union members it is generally traditional (as the saying goes in labor-union parlance) to respect a picket line, and to refrain from work where a picket line exists. Unquestionably, confusion arises in a jurisdictional dispute between two unions, where both are seeking bargaining rights, where one union succeeds in obtaining a contract with an employer, but the other union refuses to concede, and pickets the employer. Such was the state of affairs when, as mentioned above, CSU set up the picket lines at the Todd Shipyards in Seattle; that is, a jurisdictional dispute existed between SUP and CSU, and there was much

confusion in the minds of union men working at the Todd Shipyards. SUP, or its members, could do only one of two things, (a) they could disregard the picket lines, or (b) they could observe and respect the picket lines. The first alternative would be consistent with SUP policy to expand its jurisdiction, and, also, would be consistent with what the majority of SUP members apparently regarded as their best interests. The other alternative, that is, a refusal of SUP members to cross the picket lines, their aiding or otherwise supporting the picket lines, would assist or at least support the position of CSU, the rival union. Other unions, whose members were employed directly by the Todd Shipyards in that company's operations and not as crewmen on the "Argojohn" or the "American Mail," were, as suggested above, also confronted with the problem as to whether their members should disregard the CSU picket lines. A large percentage of the seven hundred or more workmen employed at the Todd Shipyards refused to cross the CSU picket lines. *The officials of SUP and SIUNA, however, ordered their members to disregard the picket lines.* The Todd Shipyards obtained a temporary restraining order, enjoining the picketing. Despite this, the picketing was continued by CSU until individual pickets were arrested and taken into custody. On May 23, the King County superior court permanently enjoined the picketing. Apparently, after some confusion and indecision, the employment or work of SIUNA and SUP crew members on the two vessels continued. Similarly, members of other unions resumed their work and general operations of the Todd Shipyards, as well as repairs to the two above-mentioned vessels, were resumed.

John Mahoney and other members of the Seattle branch of SUP (apparently a minority of the total SUP membership) were opposed to the action taken by SUP headquarters, whereby it was ordered that the CSU picket lines should be disregarded. This may have been because Mahoney and his group did not think

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SUP should expand its jurisdiction, because they preferred that the union should operate as it had in the past, because they wanted to assist the purported left-wing leaders of the CSU in the jurisdictional dispute with SUP, or because of other reasons best known to members of this dissenting minority. *Whatever their reasons, their opposition was contrary to their union's policy* and to the specific orders from SUP headquarters implementing that policy. In this connection, it should be pointed out that Mahoney had been an active member of SUP for a period of years and, frequently, had held office in the union. He was no babe in the woods as to labor union theory and practice. In fact, he was a well-informed, active, aggressive union man, thoroughly experienced and well trained in labor union policies, practices and activities.

The facts show that the controversy between SUP and CSU, involving the "Argojohn" and the "American Mail," was discussed at meetings of the Seattle SUP branch on May 9, May 16, and May 23, 1949. The evidence is conflicting as to whether Mahoney was present at the meeting of May 9. There is little dispute that he was present at the meetings of May 16 and May 23. There is some dispute as to whether he was present at the May 16 meeting at the particular time the "Argojohn" controversy was discussed. At the May 23 meeting, John Mahoney was recognized by the chairman. He thereupon made certain remarks relative to the controversy between SUP and CSU, involving the "Argojohn" and the "American Mail," and the CSU picket lines at the Todd Shipyards. Based upon the remarks, the headquarters of SUP in San Francisco filed charges against Mahoney. Unquestionably, disciplinary action against Mahoney was contemplated. Mahoney received a written copy of the charges, which read as follows:

> "We, the undersigned book members and officials of the Sailors' Union of the Pacific, hereby prefer charges against John Mahoney, Book No. 4344, for the following reasons:

"Mahoney's scurrilous and defamatory remarks entered in the minutes of the Seattle meeting May 23, 1949, when John Mahoney 'wanted to know who gave the pie-cards the authority to engage in strike breaking activities and how come the membership of the organization were not kept advised of this' and also because of his remarks entered in the minutes of the Seattle meeting June 6, 1949, when Mahoney reiterated the same statement.

"The above are definite violations of the Constitution of the Sailors' Union of the Pacific which are listed as follows:

"1. Violation of the Obligation.

"2. Violation of Article III, Section 4.

"3. Violation of Article V, Section 1.

"We hereby request that John Mahoney, Book No. 4344, appear before a trial committee at Headquarters in accordance with Article XIX, Section 1.

"(Signed) Wm. Mendez, No. 5059
Albert Maniscalco, No. 4805
Thomas Hookey, No. 3459
George Kleist, No. 2807
A. J. Pawlick, No. 2685
J. E. Pohorence, No. 2882
Harry Johnson, No. 3632

"Trial will be held at Headquarters (San Francisco) 10:00 a.m. July 5, 1949."

The SUP membership obligation and part of Article III, § 4, and Article V, § 1, of the union's constitution, referred to in the written charges against Mahoney and allegedly violated by him, read as follows:

"Obligation. I pledge my honor as a man, that I will be faithful to this Union, and that I will work for its interest and will look upon every

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member as my brother; that I will not work for less than Union wages and that I will obey all orders of the Union. I promise that I will never reveal the proceedings of the Union to its injury or to persons not entitled to know it. And if I break this promise, I ask every member to treat me as unworthy of friendship and acquaintance. SO HELP ME GOD!"

"ARTICLE III. Membership. SECTION 4. . . . *Any member who advocates and/or gives aid to the principles and policies of any hostile or dual organization, or gives aid or comfort to such, shall be denied further membership in this Union.*

"ARTICLE V. Duties of Members. SECTION 1. It shall be the duty of each member to be true and loyal to the Union and the labor cause, and to endeavor to put into practice the principles laid down in the Preamble. *Members shall treat the officers of the Union* while discharging their duties *with due respect and consideration*, and *yield strict obedience to such rules as the Union may see fit to adopt.*" (Emphasis supplied).

Thereafter, at a regular meeting on July 5, 1949, the Seattle branch, acting as a committee of the whole, reviewed the charges and exonerated Mahoney by an overwhelming vote. Subsequently, this action by Seattle was disapproved by all other SUP branches, except Portland. Mahoney did not appear for trial before the trial committee at the headquarters in San Francisco. For some reason, the date of his trial was continued to July 12, 1949, when he was tried *in absentia*, convicted by the trial committee in San Francisco, and was expelled from the union. All of the branches, except the Seattle and Portland branches, concurred in the action of headquarters. Thereafter, the rift between the Seattle branch and headquarters widened considerably. Statements were made, and articles highly critical of Mahoney appeared in SUP official publications. Numerous members of the Seattle branch

rallied to Mahoney's defense. Funds were raised and a mimeographed publication called the "Defender" was distributed. The "Defender" supported Mahoney and countered the statements and articles appearing in SUP official publications by severely criticizing SUP officials for the action taken against Mahoney by the headquarters trial committee. At one stage of the fight, an attempt was made by both sides to compromise the difficulties. In this connection, Mahoney requested a new trial in San Francisco. Apparently the breach was too wide. The efforts to compromise failed. Headquarters denied a new trial.

During the controversy between Mahoney and SUP, there was a job to be filled on the "S. S. Baranof." The oldest valid shipping card in the Seattle branch at the time was held by Mahoney. Except for his controversy with the union, Mahoney claims that he would have secured the particular employment on the "Baranof." Because of his expulsion, the union did not refer Mahoney to the employer for the job. Another union member was dispatched by the union and obtained the employment. Mahoney's principal claim to damages is based upon the earnings he alleges he would have made, if expulsion had not prevented him from obtaining the job on the "Baranof."

The facts show that Mahoney had been involved in an accident aboard another ship, had brought a personal injury action against the vessel's owners, and had made a compromise settlement for the not too inconsiderable sum of twenty thousand dollars, in May, 1949. Appellants contended in the trial court that the compromise of the personal injury lawsuit raised considerable doubt as to whether the vessel owners would have employed Mahoney, and as to whether he was physically fit to have accepted the employment on the "Baranof," even if the union had dispatched him for the job.

The trial of this case consumed approximately two weeks. The statement of facts is over thirteen hundred

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pages in length. There are forty-six assignments of error. The briefs of all parties total over four hundred pages. These factors alone, to say nothing of the complexity of the questions involved, indicate a task of no small proportions was imposed upon the trial court in disposing of this case. In passing, I express appreciation for the extensive memorandum opinion of the trial court, and the assistance it has given in analyzing the problems in this case.

In the trial court, in appellants' briefs and argument here, inferences have been advanced repeatedly that CSU is a left-wing communist-dominated labor organization. Obviously, the inference attempted is to the effect that Mahoney was in league with a subversive element in CSU and that his conduct, encompassed by the union's charges, was in aid or support of a dual, subversive labor organization. As to this, the trial court, in his memorandum opinion, pointed out:

> "In referring to the vast centralization of power in the hands of headquarters in this union, which is evident in its constitution, I do not imply that Mr. Lundeberg and his aides may not have believed that it was vital, to the advancement of the union, to suppress any opposition to their policies, but this does not make their acts valid. *Their counsel claim they were engaged in a life and death struggle with subversives. But, assuming this to be true, it did not justify resort to Fascist tactics. It may be that Mahoney and his supporters are radical malcontents who seek to disrupt the union. There was no proof they were,* but if they are they can be tried and expelled after notice and a fair trial, but certainly not otherwise. I do not see how any court of justice can condone the ruthless purge by which Mahoney and every one of his supporters who did not bow to ukase of the dictators at headquarters were cut off with such implacable fury as this record attests. The issues in evidence of the West Coast

> Sailor, the official publication of the union, make plain the fate that awaited the recalcitrant." (Emphasis supplied).

The trial court, among other things, found (a) that Mahoney had not made the specific statement which was attributed to him in the union's charges, quoted above; (b) that, on May 23, 1949, at a regular meeting of the Seattle branch, ". . . John Mahoney, requested a point of information from the agent through the Chair, requesting to know 'who gave the officials or pie-cards the authority to send men through the Canadian Seamen's Union picket lines';" (c) that Mahoney had not violated the provisions of the union's constitution, as charged; (d) that he should have been tried, if at all, in Seattle. In its judgment dated January 4, 1952, the court ordered reinstatement, and awarded damages to Mahoney in the sum of $3,533.63, plus interest. The judgment further provided:

> ". . . and plaintiff is further awarded judgment from said defendant at the rate of $453.90 per month, less any earnings he may have, from October 30, 1951, until such time as the judgment herein shall become final and absolute and that the Court at such time shall make such a determination as to said amount of additional judgment, and it is further
>
> "ORDERED, ADJUDGED AND DECREED that the defendant Sailors Union of the Pacific be and it is hereby permanently enjoined from attempting to again expel plaintiff for any of the matters or things alleged in plaintiff's complaint and proven at the trial of this cause, or for plaintiff's attempt since the date of his alleged expulsion to gain reinstatement, and it is further
>
> "ORDERED, ADJUDGED AND DECREED that plaintiff be and he is hereby awarded his costs and disbursements to be taxed herein."

Appellants' assignments of error relative to the

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findings of the trial court, designated above as (a), (b), (c), and (d), seem to me to be meritorious. In support of the assignments of error, the appellants contend that the controversy with Mahoney involved internal organizational policy matters; that the trial court had no authority to try the matter *de novo*, and was bound to accept the findings of the trial tribunal of the union, and was limited to an examination of the union's constitution and an inquiry as to whether Mahoney had been accorded all of his rights thereunder. Appellants urge that the charges against Mahoney were too narrowly construed by the trial court; that Mahoney was charged in writing with making "scurrilous and defamatory" remarks in violation of the union constitution; that the written charges must be read or interpreted in context against the background of the jurisdictional dispute between SUP and CSU, the CSU's picket lines at the Todds Shipyards, and Mahoney's opposition to SUP's policy to expand its jurisdiction and his expert knowledge of union affairs, policies and procedure; that, in this connection, the validly adopted policy of SUP to compete with CSU for collective bargaining rights should be read into the charges against Mahoney. It is the union's position that Mahoney's remarks at the May 23 meeting, although superficially appearing to have been made to obtain information, actually were made, designedly, for another purpose, *i.e.*, to aid and support CSU, a rival union; that, as a practical matter, Mahoney knew all of the facts relative to the controversy between SUP and CSU, was aware of SUP's orders to its members—that the CSU picket lines at Todd's shipyards should be disregarded by SUP members. In other words, the union contends that Mahoney's remarks simply could not have been made for the purpose of obtaining information which was already in his possession and was also known to other members of the Seattle branch; that by making the particular remarks under the existing circumstances, Mahoney was urging Seattle branch members to actively oppose SUP

policy, to the detriment of his own union and in aid of CSU, the rival union; that his action should not be characterized merely as discussion or an exercise of his right of free speech in a closed union meeting; that he asked a loaded question, knowingly and intelligently, for the purpose of getting members of the Seattle branch to respect the CSU picket lines, contrary to SUP policy and contrary to specific orders to SUP members from officials of the headquarters branch; that acquiescence of the Seattle members in Mahoney's plan would have stopped work indefinitely on the "Argojohn" and the "American Mail" by SUP members and by other union men; that the result would have been a violation of SUP's no-strike, no-work-stoppage contract provision with the ship owners. Appellants contend further that, under the union constitution, San Francisco was the proper place to try the charges; that Mahoney refused to appear for trial before the union's duly selected trial committee, thereby defaulting and waiving any rights he might otherwise have claimed; that the entire proceedings were regularly conducted and in order; and that the superior court for King county erred in ordering a reinstatement of Mahoney to membership and in awarding damages to him.

Mahoney contends that the authority of courts of law to review the evidence before a union trial committee and the action by that committee to expel a member from the union, should not be construed as narrowly as the union suggests; that he did not make the statement specifically attributed to him in the union's charges; that a preponderance of the evidence before the trial court supports a finding to the latter effect. He contends that he made a much less objectionable statement than the one charged; that a preponderance of the evidence supports the trial court's finding that he merely "requested a point of information from the agent, through the Chair, requesting to know 'who gave the officials or pie-cards the authority to send men through the Canadian Seamen's Union

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picket lines'." It is contended that the union is in the position of having charged him with making a specific remark, although the evidence supports the trial court's finding that a different remark was made; that the written charges against him must be construed strictly without any subtle inferences which possibly might be supplied by reference to the alleged background of the charges; that the remarks, as made by him, did not violate the union constitution; that the written notice of the charges received by him was indefinite and vague, and was inadequate to apprise him of the nature of the offenses charged. He further contends that his trial, if any, should have been in Seattle before a trial committee, selected from the membership of that branch; that he was ready, able and willing to accept employment on the "Baranof," could and would have done so, except for his expulsion.

At this point, it seems pertinent to observe that organized labor has progressed a long way since the day when the efforts of workers to organize for the purpose of improving working conditions and wages were, sometimes, held suspect and were characterized by courts of law as conspiracies inimical to the public good, or were held to be actually criminal in nature. The acquisition of status and power by organized labor as an institution of our contemporary economic society has not been without a correlative assumption by labor or an imposition upon labor of definite responsibilities to society. In this connection, it may seem to some that at times the courts have been reluctant to remind labor organizations of their responsibilities to society, and that other branches of government have sought to avoid the necessity of doing so. However that may be, where circumstances warrant and the duty is clear, the courts must, do, and will act. Nevertheless, in the process, there are inherent dangers. In other fields of judicial activity, there are decades and even centuries of experience. There are guiding principles and precedents, developed case by case over many years, involving close examination of various fields of human rela-

tions. In other fields, the courts, in making decisions, may refer to and rely upon a wealth of judicial knowledge and experience. The situation may be quite different where labor union controversies are concerned, involving as they do a variety of strained human relations, charged with dynamic, social, and emotional content. In other words, in the evolving field of labor law, new and novel questions are often presented, and, frequently, decisions must be made without the help of precedent.

By way of comparison, problems which involve conflicting interests of majority and minority stockholders in a business corporation have a fairly extensive legal or judicial history. Perhaps as a result of this background, any natural or subjective tendency to view too sympathetically the cause of the underdog, *i.e.*, minority stockholders, has given way to a more objective appraisal and recognition of the merits of majority rule, defining the latter in terms of the desirability of sound, efficient corporate business management as a worthwhile social objective. Because judicial history is not so extensive regarding conflicts between majority and minority membership groups of labor organizations, objectivity as to majority rule may be difficult, and the ascertainment of socially desirable results may not be so readily and clearly apparent. Unquestionably, in the instant case, this court is presented with a highly complicated labor union problem. Inherent in the disposition of the matter, feelings of uncertainty will not be alleviated, and the possibility of error will not be minimized by the availability of numerous applicable, wise, and persuasive precedents. But this court should not permit misplaced sympathy or the psychology of protecting the underdog to confuse and to conceal the more important issues explicit in this appeal.

Obviously, to many individuals, the right to membership in a union is a very personal thing, tantamount to earning a living, to peace and security for

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themselves and their dependents, and deprivation of union membership is a serious matter. On the other hand, the orderly operation of a labor organization in the lawful furtherance of the proper interests of the majority of its members, the right of the majority of rank-and-file dues-paying members to vote or, through democratic processes, to formulate union policy and to implement such democratically determined policies, as well as the right of such a majority, to discipline the dissenting members whose acts obstruct the lawful aims of the majority, are also matters of no small concern. See 21 A.L.R. (2d) 1397, Annotation: "Unfair or defective proceeding of labor union in expelling, suspending, or fining member as ground for judicial intereference," §II.

A cursory examination of this case in the light of legal reasoning or standards usually applicable respecting criminal indictments and prosecutions could lead to affirmance of the disposition reached by the trial court. The same end result could be worked out if it is assumed that the basic questions in the case involve solely the right of freedom of speech on the part of a union member at a closed meeting of his union, and his right to a fair trial before an impartial tribunal in connection with any action to expel him from the union.

On the other hand, if convinced there is more to this case than meets the eye, that other considerations are involved in addition to those outlined immediately above, that the basic questions in the case involve the right of the majority of rank-and-file dues-paying members to determine upon union policy and to discipline a dissenting minority member, not merely for debating or voicing opposition to such union policy in a closed union meetng, but for overt acts (a) *obstructing the policy* of his union, (b) *defying orders* of the officials of his union, and (c) *aiding* and *supporting* a *rival* Canadian union, then the trial court should be reversed.

I do not agree with the distinction made by the trial court between (a) the remarks as attributed to Mahoney in the union's charges, and (b) the remarks which Mahoney admitted he made at the union meeting of May 23, 1949. Mahoney's version of the matter unquestionably is phrased in milder language. However, for all practical purposes, the effect of the two statements seems to me to be the same. In the one, the term "strike breakers" was used. The other remark merely questioned the union *in ordering men to go through the CSU picket lines.* But the *crossing of picket lines* is regarded in labor circles as a *strike-breaking activity.* Consequently, irrespective of the manner in which *the crossing of picket lines* may have been referred to or characterized, the practical result of Mahoney's having made either statement was about the same. Furthermore, it seems to me a preponderance of the evidence would support a finding that something more tangible or overt than discussion, debate, or the exercise of freedom of speech in a closed union meeting, was implicit in the making of the remarks by Mahoney under the then existing circumstances.

Lifted out of context and considered abstractly, Mahoney's remarks at the May 23 meeting (either version) may appear to add up to one thing, and a very innocuous matter at that. But the remarks, and the fact he made them in the charged atmosphere of the union meeting, under the then existing circumstances (involving the picket lines at the Todd Shipyards and the background thereof, with more than seven hundred union workmen in the Seattle area, including SUP members, confused and perhaps undecided as to whether they would disregard the CSU picket lines and continue working in the shipyards), add up to an entirely different proposition, in my judgment. As Mr. Justice Holmes once said (*Schenck v. United States,* 249 U.S. 47, 52, 63 L. Ed. 470, 39 S.C. 247):

> ". . . We admit that in many places and in ordinary times the defendants in saying all that was

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> said in the circular (which had been mailed to men called and accepted for military service with the intent to influence them to obstruct the draft) would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, 195 U. S. 194, 205, 206. *The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.* It does not even protect a man from an injunction against uttering words that may have all the effect of force." (Emphasis supplied).

In other words, it is one thing to strike a match and light a cigaret on the corner of Main street, but doing the same thing in a gunpowder factory is an entirely different matter.

My analysis of this case is that Mahoney's action and conduct in making the remarks at the May 23 meeting must be described and placed in one of three categories: (1) He was merely requesting information; (2) He was merely *voicing* opposition to the SUP expansionist policy, hoping to change it through normal union procedures; or (3) He made the remarks to highlight to the members present the fact that he (Mahoney) was supporting the CSU picket lines in opposition to the orders from the headquarters branch (intentionally and designedly using superficially innocent and innocuous, yet nevertheless very effective, union-meeting technique or group psychology to crystallize member support behind him and to mobilize support in the Seattle branch for the CSU picket lines); that in so doing, Mahoney was soliciting other members to actively help and support the rival union's picket lines, in open defiance and disregard of his own union's policy and best interests, in violation of union orders, in violation of the union's no-strike, no-work-stoppage contract with the "Americal Mail Line," and,

possibly, in violation of court orders enjoining the CSU picketing.

I have considerable doubt as to whether conduct falling in categories (1) and (2), above, would constitute expellable violations under the union's constitution. However, it is not necessary to pass directly on such questions, because I believe that Mahoney's conduct falls in category (3), and, as such, that it constituted an expellable violation of the union's constitution. I am convinced that the evidence preponderates against the finding by the trial court, set out above, that Mahoney's conduct fell in category (1). As pointed out heretofore, Mahoney was an experienced, well-informed union member; he was a former official and a leader of considerable standing in his union. Among other things, the evidence strongly indicates that he was present at meetings of the Seattle branch on *May 9* and *May 16*, when the jurisdictional controversy between CSU and SUP, involving the "Argojohn," was discussed. In this and other respects, from the record evidence in the trial court, it is inconceivable to me that Mahoney lacked the precise information which his remarks purportedly solicited or sought from the chairman at the April 23 meeting.

As a general proposition, I think that the right to membership in a labor union is so important that the concepts of fair play or due process of law, evolved so laboriously over a long period of Anglo-American legal history, should be kept in mind and carefully observed in connection with union trials involving the discipline of members. Among other things, generally speaking, this would seem to imply adequate notice of charges, an opportunity by an accused to prepare for trial and to defend himself by testifying and producing witnesses and evidence in his behalf before an impartial tribunal. In this connection, it might be desirable procedure if legal principles applicable to the rights of an accused in a criminal trial were observed. But realistically, there are differences in the two kinds of pro-

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ceedings, and I am not prepared to say that a union trial must be conducted with all of the particularity applicable to the rights of a defendant in a criminal prosecution. See 21 A.L.R. (2d) 1397, 1415, § 6.

I believe that the written union charges gave adequate notice to Mahoney to enable him to prepare for defense of the charges. This is particularly true in view of the facts pointed out heretofore, that Mahoney was an experienced labor man. It is fairly obvious that the union charges were not prepared by a lawyer but by union officials—perhaps, by the members of the trial committee selected by headquarters at San Francisco. Interpreted in view of the circumstances existing at the time, I think Mahoney could not have been under any reasonable misapprehension as to the charges, and should have realized that he was confronted with something much more serious than a charge that he had made certain specific remarks, had engaged in a discussion, or, as claimed by him, had merely exercised his right of freedom of speech. I note that it is not contended by Mahoney that any effort was made by him to have the union explain or amplify the charges.

As to the selection of a trial tribunal and the place of trial, the union constitution provides that a trial committee be selected and a trial be held in a port most convenient to the accused, the accuser, and the witnesses. Inconsistencies in this provision of the union constitution are so obvious that it is doubtful whether it could be strictly complied with in any event. In the instant case, the convenience of the accused may indicate Seattle as the place for selection of the trial committee and for the trial. The convenience of witnesses might better have been served if the choice had been in Seattle, but this is debatable. The convenience of the accusers certainly would indicate San Francisco. Mahoney contends that his trial in San Francisco would have resulted in only one thing—conviction and expulsion. On the other hand, from the record, the union might very well have claimed that his trial in

Seattle would have resulted in only one thing—exoneration and no expulsion. Consideration of the particular provision of the union's constitution might very well result in a dilemma, except for certain facts which I regard as significant. Mahoney did not object to the composition of the trial committee on the ground of prejudice or bias of any of its members. He entirely ignored the notice for him to appear for trial in San Francisco. He now claims that his appearance there and any effort to defend himself there would have been useless and futile. I will not speculate as to this. A trip to San Francisco may have involved some personal expense to Mahoney and it is conceivable that he might not have been able to afford the extra expense of having numerous witnesses present in San Francisco, but their depositions might have been taken and made a part of the record before the union's trial committee, and without too much expense to Mahoney. SUP members work in and out of various ports. At the time of the union trial, Mahoney's witnesses might not have been in Seattle. They might have been in port in San Francisco, or elsewhere. Mahoney chose to rely on his alleged right under the union constitution, to ignore the trial in San Francisco. He insisted that his problem should be worked out in the more friendly atmosphere of Seattle, where, understandably, he had reason to think the members of the Seattle branch would support his side of the controversy.

I think Mahoney should have stood trial in San Francisco, thus making his record in the union proceedings there. If that had been done, the record would be available for examination and this court would not be in the position of having to speculate as to what might or might not have transpired there—particularly, as to whether his trial there would have been contrary to reasonable and judicially acceptable concepts of fair play.

It seems to me that the trial court interpreted the union's written charges too strictly and that the

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charges and the provisions of the union constitution relative to giving aid and comfort to a hostile or dual union, disobedience of union rules or policies, must be construed against the background of facts and circumstances peculiar to the instant case. These facts and circumstances involve the jurisdictional dispute between the two unions, SUP's expansionist policy (approved by a majority of the members), the CSU picket lines at Todd Shipyards. SUP's orders to its members to ignore the picket lines, SUP's collective bargaining agreement with the owners of the "Argojohn" and the "Americal Mail," and lastly, Mahoney's knowledge and experience as an active, aggressive, well-informed member and exofficial of the Seattle branch of SUP. It is my view that SUP's written charges alleged a violation of the union constitution and that a preponderance of the evidence before the trial court supports a finding or conclusion that Mahoney's conduct constituted a violation of the union constitution. The findings of the trial court to the contrary should be reversed.

In view of the disposition of the foregoing matters, as indicated herein, it is not necessary for me to consider the question of damages. However, in passing, I do make note of the facts in the record relative to Mahoney's compromise of his personal injury litigation for the not unsubstantial sum of twenty thousand dollars at a time, as claimed by him, when he was ready, willing and *physically* able to accept employment as a sailor on the "S. S. Baranof." I also note the testimony of Mr. Zumdieck, an official of the company operating the "S. S. Baranof," to the effect that he would not have given Mahoney the job on the ship, if he had known Mahoney was applying for employment.

In my opinion, the judgment of the trial court should be reversed, and the case dismissed.

FINLEY, J.

I concur. SCHWELLENBACH, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN MAHONEY,
Respondent,

vs.

SAILORS' UNION OF THE PACIFIC, a voluntary association, ROBERT DOMBROFF, R. JOHANSEN, and HARRY LUNDEBERG,
Appellants.

No. 32101
EN BANC
Filed *October 25, 1954.*

This case was argued first in department, and then re-heard by the entire court. In an *En Banc* opinion, reported at 43 Wn. (2d) 874, 264 P. (2d) 1095, we affirmed the judgment for plaintiff. Thereafter, we granted a second rehearing *En Banc*, to consider a jurisdictional question in the light of several Federal court decisions which have been reported since our opinion was filed.

Specifically, this question is whether the labor management relations act of 1947 (hereinafter referred to as the act), 61 Stat. 136 *et seq.*, 29 U. S. C. 1952 ed., Sec. 141 *et seq.*, commonly known as the Taft-Hartley act, has given the national labor relations board (hereinafter referred to as the board) such exclusive jurisdiction over the subject matter of this action as to preclude the courts of this state from hearing and determining its issues.

The principal subject matter of this action is appellant union's asserted interference with, or deprivation of, Mahoney's right to obtain employment with certain employers.

In arguing that, under the facts of this case, the board has such exclusive jurisdiction over this subject matter as to preclude state action, appellants and *amici Curiae* make these points: (1) If the union in-

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terfered with, or deprived Mahoney of, this right in the manner alleged, such conduct by the union was an unfair labor practice, within the meaning of the act; (2) such unfair labor practice, if any, affects commerce, as that term is defined in the act; (3) the board, in that event, was empowered to prevent such practice and grant affirmative relief; and (4) this being the case, state action has been superseded.

Relative to the first of these points, that is, whether the union's asserted interference with, or deprivation of, Mahoney's right to obtain employment was an unfair labor practice, several sections of the act have been called to our attention. Among these is Sec. 8 (b), 29 U. S. C. 1952 ed., Sec. 158 (b), which reads in part as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(2) to cause or attempt to cause an employer . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues . . . uniformly required as a condition of . . . retaining membership."

The facts regarding Mahoney's expulsion from the union are fully set forth in the prior opinion. It is sufficient here to say that his membership in the union was terminated on a ground "other than his failure to tender the periodic dues." He therefore is within the class of persons concerning whom an act of a union in causing or attempting to cause discrimination by an employer would be an unfair labor practice under the statute quoted above. It remains to be determined whether appellant union did cause or attempt to cause an employer to discriminate against Mahoney.

As to this, the facts appear to be about as follows: At the time Mahoney was expelled from the union, it had a collective bargaining agreement with Alaska

Steamship Company and thirty-two other steamship companies, all of which operate vessels out of north Pacific ports. Under this contract, these employers agreed to recognize the union as the representative of their unlicensed deck personnel, for the purpose of collective bargaining. They also agreed that, in hiring employees in the classifications covered by the agreement, they would prefer applicants who had previously been employed on vessels of one or more of the companies signatory to the agreement.

The union agreed that, "in furnishing deck personnel" to employers "through the facilities of their employment office," it would recognize such preference and furnish seamen to the employers with due regard thereto and to the competency and dependability of the employees "furnished". The contract provides that, when an employer rejects men "furnished" who are considered unsuitable and unsatisfactory, it must furnish a statement in writing to the union stating the reason for the rejection. The union may thereupon refer the matter to the "port committee" for investigation, hearing, and adjudication. The port committee consists of six members, three appointed by the union and three by the employers.

Under the procedures and practices of the union pursuant to this contract, a union member who desires employment as a sailor with one of these employers registers at the union office and a shipping card is issued to him. At the time Mahoney was expelled, these cards were good for sixty days. When this period had run, the cards expired, and holders desiring employment were required to reregister and receive a new card. If a member who holds such a card is absent from two consecutive union membership meetings, he must register and receive a new card, unless his absence is due to his employment.

When one of the employers needs an employee in this classification, it notifies the union office at the appropriate port. A union official then calls out the request.

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Those members present who are interested in the job submit their cards. The man whose card bears the oldest date is assigned to the job. He holds the job until he is discharged or quits.

Mahoney completed a job as maintenance man on the American Mail Line's SS India Mail, about the middle of May, 1949. On July 18, 1949, before Mahoney had applied for a new shipping card, he was expelled from the union. He nevertheless applied for and received such a card on July 28, 1949. The union employee who issued this card testified that he did so because the action of the headquarters office (San Francisco) in expelling Mahoney had not yet been concurred in by the Seattle branch, and it was not then known what action other branches had taken.

On August 4, 1949, while Mahoney held this card, the Alaska Steamship Company requested the Seattle office of the union to furnish a man for a job on the SS Baranof. Mahoney was qualified for this job and held the most eligible card for it. However, when he went to the union dispatcher for the assignment, the dispatcher said he would have to check the matter.

The Seattle office of the union then communicated with its San Francisco headquarters. The assistant secretary of the union handled the matter at San Francisco. He immediately advised the Seattle office that the shipping card had been issued to Mahoney under "rudess" and "he is not entitled to ship." The Seattle office thereupon declined to assign Mahoney to the SS Baranof, and a member in good standing got the job.

The union's shipping card and assignment procedures also operated to deprive Mahoney of the opportunity of finding employment with other employers. The trial court found that Mahoney has been denied permission to sail and is unable to obtain employment as a sailor upon any of the vessels shipping from Pacific coast ports.

We therefore conclude that appellant union, through its shipping card and assignment procedures, did cause employers to discriminate against Mahoney. Since such discrimination was with respect to an employee whose membership in the union had been terminated on a ground other than failure to tender periodic dues, it follows that such union procedures constituted an unfair labor practice, within the meaning of Sec. 8 (b) (2) of the act, quoted above.

It is to be observed that this unfair labor practice consists not in Mahoney's wrongful expulsion from the union, but rather in the procedures followed by the union whereby employers were caused to discriminate against employees whose membership had been terminated on a ground other than failure to tender periodic dues. Thus, such union procedures would constitute an unfair labor practice even though Mahoney's expulsion had been valid.

This brings us to the second point advanced by appellants and *amici curiae*, as noted above; that is, that the unfair labor practice in question affects commerce, as that term is defined in the act. See 29 U. S. C. 1952 ed., Sec. 152 (6), (7). This appears to be conceded by respondent.

As their third point, appellants and *amici curiae* argue that the board was empowered to prevent this particular kind of unfair labor practice and to grant affirmative relief.

The act provides that the board is empowered to prevent any person from engaging in any unfair labor practice affecting commerce. 29 U. S. C. 1952 ed., Sec. 160 (a). The board is specifically authorized to issue and enforce, through court procedures, orders requiring persons to cease and desist from such unfair labor practices, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the act. 29 U. S. C. 1952 ed., Sec. 160 (c), (e); *Born v. Laube*, 213 F.

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(2d) 407 (C. A. 9th, decided May 26, 1954); petition for rehearing denied *per curiam*, July 15, 1954, 214 F. (2d) 349; *certiorari* denied, — U. S. —, — S. Ct. —, — L. Ed. —.

Radio Officers' Union of Commercial Telegraphers Union, A. F. L. v. National Labor Relations Board, 347 U. S. 17, 74 S. Ct. 323, 98 L. Ed. 251, provides a very recent example of the kind of relief the board can afford in a case such as this. The union had a collective bargaining agreement under which employers agreed, in filling vacancies in the position of radio officer, to select radio officers who were members of the union in good standing. The union wrongfully suspended one William C. Fowler, and notified the company which had offered him a job that Fowler was not in good standing with the union. Being unable to obtain union clearance on Fowler, the company gave the job to another man supplied by the union.

On the basis of charges filed by Fowler, the board issued a complaint against the union, conducted the usual proceedings, and issued an order requiring the union to cease and desist from the unfair labor practice. The union was ordered to notify Fowler and the company that it withdrew objection to his employment and to request the company to offer him employment. The union was also ordered to make Fowler whole for any loss of pay he might have suffered by reason of the union's acts. See. 93 N. L. R. B. 1523, 1528, 1546.

Appellants and respondent appear to disagree as to whether the board is empowered to order a union to reinstate a member who has been wrongfully expelled. On this branch of the case, the question is not material, since, whether or not the board has that power, it does have power, as indicated above, to terminate the unfair labor practice and to grant affirmative relief. As before noted, the unfair labor practice consisted not in Mahoney's expulsion, but in the procedures and acts whereby the union caused employers to discriminate against an employee who had been expelled.

As their fourth and final point, appellants and *amici curiæ* argue that, in view of points one to three, discussed above, state courts are precluded from granting relief as to the subject-matter of the action which has been under discussion.

We find this position well taken, both as to injunctive and compensatory relief.

If the acts complained of by an employer constitute an unfair labor practice affecting commerce, as defined in the act, then *injunctive* relief in state courts is precluded, unless such traditionally local matters as public safety and order and the use of streets and highways are involved. *Garner v. Teamsters, Chauffeurs and Helpers Local No. 776 (A.F.L.)*, 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 161; *Born v. Laube, supra.* The case before us does not involve a traditionally local matter, within the above statement of principle.

Under like circumstances, *compensatory* relief in state courts is also precluded if the act sets up a procedure under which compensation may be received. *Born v. Laube, supra.* In the *Born* case, the court was held to be without jurisdiction, because the act provides a procedure under which the plaintiff in that action could have obtained the compensatory relief which he sought—recovery of lost earnings.

United Construction Workers v. Laburnum Construction Corporation, 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 686, relied upon by respondent, does not announce a different rule. In that case, the state court was held to have jurisdiction, because the act does not provide a procedure under which the plaintiff in that action could have obtained the compensatory relief which he sought damages for loss of profits due to interference with the performance of the plaintiff's contracts. This distinction is pointed out in the *per curiam* opinion handed down in *Born v. Laube*, denying a petition for rehearing, 214 F. (2d) 349.

As before indicated, the act does provide a procedure

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under which appellant union can be required to compensate Mahoney for loss of earnings. We are therefore of the opinion that, with respect to the principal subject matter of this action—appellant union's interference with, and deprivation of, Mahoney's right to obtain employment—the board has such exclusive jurisdiction as to preclude independent court procedures to obtain relief.

The trial court was therefore without jurisdiction to grant compensatory damages to Mahoney because of earnings lost by reason of the union's unfair labor practice. It was also without jurisdiction to order Mahoney's reinstatement in the union with all the rights and privileges of membership, in so far as such order was intended as a means of forcing the union to cease such unfair labor practice. See *Born v. Laube, supra.*

But there is another subject matter of this action which though much less emphasized in the pleadings, evidence, and arguments, must also be considered.

In order clearly to present this matter, a brief review of the purport of our first opinion is necessary. It was established in that opinion that the action of the union in expelling respondent from the union was wrongful, because (1) the conduct of respondent which was given as the reason for the expulsion was not a violation of the union constitution for which he can be expelled; and (2) appellant union violated its constitution in conducting the trial at San Francisco instead of Seattle. No rehearing was granted as to these determinations, and they represent the established law of the case.

In that opinion, we held that respondent was entitled to redress against the union because of this wrongful act of expulsion, in view of the fact that it deprived him of a property right without due process of law. This was consistent with the position this court has always taken that application may be made to the courts to protect one's right to membership in a volun-

tary association, when pecuniary or property rights are involved. *State ex rel. Cicoria v. Corgiat*, 50 Wash. 95, 96 Pac. 689; *Ray v. Brotherhood of Railroad Trainmen*, 182 Wash. 39, 44 P. (2d) 787. In *Washington Local Lodge 104 v. International Brotherhood of Boilermakers*, 33 Wn. (2d) 1, 203 P. (2d) 1019, we said:

> "Speaking generally, it is not within the province of the courts to regulate the internal affairs of labor unions or other voluntary organizations, but it is within the powers of the courts, and indeed it is their duty, to protect the property rights of the members of such organizations, when they are threatened and endangered, without specific charges and opportunity to be heard." (p. 74).

In applying this principle, we made reference in our first opinion to respondent's right to earn a livelihood as the property right being protected. In view of the recent Federal court decisions construing the act, noted above, we now feel that this particular property right, under the facts of this case, is not subject to protection in the courts of this state.

But respondent also asserts that the union's wrongful act in expelling him deprived him of other property rights which may only be protected in the courts of this state, and which the court has consistently protected in the past.

In respondent's amended complaint, it is alleged that, in addition to his right to earn a living as a sailor, he, as a member of the union, has valuable property rights in its treasury "to the same extent that each other member has" and in any other funds the union may have. In support of this allegation, testimony was received from a union official to the effect that dues are collected from members and are deposited in the union treasury; that the union has a health and welfare plan under which all members of the union in good standing are entitled to benefits; and that the union

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accords its members burial benefits amounting to one hundred twenty-five dollars.

The trial court entered a finding of fact which states in part that respondent, as a member of the union, has valuable property rights in its treasury, to the same extent that each other member has, and in any other funds the union may have. This portion of the findings of fact was not challenged by appellants, and so becomes an established fact of the case.

Unless our jurisdiction to protect property rights of the kind just mentioned has been superseded by the labor management relations act of 1947, referred to above, the courts of this state will do so. See *State ex rel. Cicoria v. Corgiat, supra; Ray v. Brotherhood of Railroad Trainmen, supra;* and *Washington Local Lodge 104 v. International Brotherhood of Boilermakers, supra.*

Under the act, the board's authority, in so far as here pertinent, relates only to unfair labor practices, as defined in 29 U. S. C. 1952 ed., Sec. 158. To remedy such practices, the board may require the union or employer to cease and desist, and may "take such affirmative action including reinstatement of employees with or without pay, as will effectuate the policies" of the act. 29 U. S. C. 1952 ed., Sec. 160 (c).

Therefore, if the board has authority to order a union to reinstate an employee to union membership, it may do so only for the purpose of preventing unfair labor practices. But the act of a union in wrongfully expelling an employee from the union is not an unfair labor practice, as we have previously pointed out. Nor is it an unfair labor practice for a union, by wrongful expulsion or otherwise, to deprive an employee of his property and contract rights as a member of the union.

The act thus affords no remedy for one who has been wrongfully deprived of contract and property rights in the union by unlawful expulsion. Nor does the act express an intention that these rights should go unpro-

tected. It follows that state court jurisdiction to protect such rights has not been superseded.

In exercising such jurisdiction, we are not called upon to surmise how the board would decide the question as to whether Mahoney's expulsion was valid or void. This is true because, under the facts of this case, the board would not be called upon to decide that question, and presumably would not decide it. As before indicated, the question of whether appellant union has been guilty of an unfair labor practice under the quoted portion of Sec. 158 (b) (2) of the act depends not at all upon the validity or invalidity of his expulsion.

Nor is the jurisdiction of this court to deal with the particular grievance now under discussion in any way affected by the fact that we may order the union to reinstate a member and the board may not, or vice versa. This court and the board each act with reference to the property right which it is authorized to protect. If the board determines that the property right to earn a livelihood does not require reinstatement in union membership, its determination is in no sense thwarted by a state court ruling that the same employee's property and contract rights as a member of the union require such reinstatement. The reverse is likewise true.

Born v. Laube, supra, does not stand for the proposition that there is supersedure in connection with the particular property rights we are now discussing. The opinions in that case do not disclose whether the employee there sought to protect any property or contract rights in the union. There is no indication that any evidence was received, or finding made, concerning his rights to share in welfare, pension, or other benefit plans. He sought only to protect his right to earn a livelihood. Since this involved discrimination, which is defined in the act as an unfair labor practice, independent court acton to protect that right was held to be superseded—as we likewise hold in this case.

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It is true that *if* the board has power to order an employee's reinstatement in his union to prevent an unfair labor practice, and *if* the employee makes timely application to the board for such relief (the six-months time limit (29 U. S. C. 1952 ed., Sec. 160 (b) in the instant case expired in 1950), and *if* the board found the union to be guilty of an unfair labor practice, and *if*, as one remedy, the board then ordered the employee's reinstatement in the union, the employee might (or might not) find his property or contract rights in the union restored.

We do not believe, however, that the protection of respondent's property and contract rights in the union ought to be left to this devious, highly uncertain, and in this case apparently foreclosed avenue of relief. The courts of this state have authority to provide a remedy and should not decline to act because of the possibility that some other agency may afford such relief as an incident to its own procedures.

In *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (A.F.L.), supra*, the court observed that the act "leaves much to the states, though Congress has refrained from telling us how much." The court then said, with reference to the particular (and different) subject matter of that action:

> "This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the state or is entirely ungoverned.' *In such cases we have declined to find an implied exclusion of state powers.* International Union, U.A.W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U. S. 245, 254, 69 S. Ct. 516, 521, 93 L. Ed. 651 . . ." (Italics ours.) (p. 164).

It is therefore our conclusion that the act does not preclude the courts of this state from ordering reinstatement of a union member where, as here, his

wrongful expulsion is found to have deprived him of his property rights in the union.

The cause is therefore remanded, with directions to modify the judgment so as to declare the purported expulsion void and a nullity, and to order the union to forthwith reinstate Mahoney and to accord to him all his property rights as a member in such union, on the condition that he pay all dues and assessments now due and payable. The provision of the judgment enjoining the Sailors' Union from further attempts to expel plaintiff for acts committed prior to entry of the judgment and the provision regarding costs shall remain unchanged. In all other respects, the judgment under review is reversed. Appellants shall recover their costs in this court.

HAMLEY, J.

We concur:

MALLERY, J.
SCHWELLENBACH, J.
HILL, J.
DONWORTH, J.
WEAVER, J.
OLSON, J.

FINLEY, J. (concurring in part and dissenting in part) — The majority takes the position that the N.L.R.B. has exclusive jurisdiction to determine the question of whether the Union committed an unfair labor practice entitling Mahoney to damages for loss of employment and wages. The portion of the judgment of the trial court awarding compensatory damages to Mahoney is reversed. I agree with this. However, the majority holds that the portion of the judgment of the trial court ordering the reinstatement of Mahoney to Union membership is a matter within the jurisdiction of the trial court because reinstatement, in this instance, does not relate to discrimination in, or loss of employment, but to an entirely different

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matter—namely, the protection of Mahoney's property rights in the funds, assets, or treasury of the Union. I agree with the majority. The N.L.R.B. has no jurisdiction to order reinstatement of Mahoney for the purpose stated hereinbefore (protection of his property rights in the Union's funds or treasury). For the reasons indicated in my dissent (43 Wn. (2d) 874, 264 P. (2d) 1095), I think Mahoney's expulsion was not improper, and I must disagree with the majority's affirmation of the trial court's judgment relative to this aspect of the case.

FINLEY, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN MAHONEY, *Respondent,* *vs.* SAILORS' UNION OF THE PACIFIC, a voluntary association, ROBERT DOMBROFF, R. JOHANSEN, and HARRY LUNDEBERG, *Appellants.*	JUDGMENT No. 32101 King County No. 412322 THURSDAY, DECEMBER 16, 1954

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 16th day of December, A. D. 1954, on motion of Levinson and Friedman, of counsel for appellants, considered, adjudged and decreed, that the cause is remanded to the said Superior Court, with directions to modify the judgment as directed by the opinion, and in all other respects the judgment under review is

reversed, neither party to recover costs on appeal. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Journal 41
at page 234
in the Office of the
Clerk of the Supreme Court

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